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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. KELVIN EDWARD VIGIL, Defendant and Appellant.	A133914 (Sonoma County Super. Ct. No. SCR-599481)

Defendant Kelvin Edward Vigil appeals from the sentence imposed by the trial court after he pled no contest to a charge of commercial burglary. He argues that his constitutional equal protection rights require the retroactive application of Penal Code section 4019 (section 4019),[1] as amended in October 2011, to award him additional presentence conduct credits despite the statute's stated prospective application. He also contends the matter must be remanded for the court to clarify certain fines imposed at sentencing. We vacate the contested fine orders and remand for clarification as to the mandatory fines imposed. In all other respects we affirm the judgment.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY[2]

On March 20, 2011, defendant and Heather Byrd entered a Home Depot store empty handed. Byrd took a calculator and defendant took a table saw. Defendant put both items in a shopping cart. Defendant then went to the return counter and returned both the saw and calculator for store credit using a receipt from the previous day. He

[1] All further statutory references are to the Penal Code.

[2] We take the facts from the probation report's summary of the offense.

then used the store credit to buy a light motion detector and a laser device. He was arrested with these items after exiting the store.

On June 20, 2011, defendant was charged by information with commercial burglary (§ 459). The information also alleged three prior prison-term commitments (§ 667.5, subd. (b)).

On August 26, 2011, pursuant to a negotiated disposition, defendant pleaded no contest to the burglary and admitted one prior prison commitment with the understanding that execution of a 28-month prison sentence would be suspended and he would serve a year in the county jail and be placed on three years of probation.

On October 18, 2011, the trial court imposed the agreed-upon sentence. The court found that defendant was entitled to 13 days of presentence credits (nine actual, plus four conduct). The court also imposed certain fines and fees, including a restitution fine of $660 (§ 1202.4, subd. (a)(3)(B)), a restitution fund fine of $400 (§ 1202.4, subd. (b)), a parole revocation fine of $400 (§ 1202.45), and a probation revocation fine of $600 (§ 1202.44). This appeal followed.

DISCUSSION

I. Presentence Conduct Credits

The recent tortuous legislative history of section 4019 has been well documented in many appellate opinions, and we need not recite it here.[3] For our purposes, it is sufficient to note that effective October 1, 2011, the Legislature amended sections 4019 and 2933 to return conduct credit rations to a more lenient formula for inmates sentenced to county jail. (Stats. 2011, ch. 15, § 482; Stats. 2011, 1st Ex. Sess. 2011–2012, ch. 12, § 16.) The revised section 4019 applies to defendants whose crimes were "committed on or after October 1, 2011." (§ 4019, subd. (h).)

Citing equal protections principles and *In re Kapperman* (1974) 11 Cal.3d 542 (*Kapperman*), defendant argues that the recent amendment to section 4019 granting one-for-one conduct credits is applicable to his case. He seeks a modification of the

[3] See, e.g., *People v. Borg* (2012) 204 Cal.App.4th 1528, 1536 (*Borg*).

judgment, to increase his presentence conduct credits by adding four additional credits. As noted above, defendant committed the instant offense on March 20, 2011, well before the operative date of the amended statute.

To succeed on an equal protection claim, a defendant must show that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner. The level of judicial scrutiny brought to bear on the challenged treatment depends on the nature of the distinguishing classification. (*People v. Wilkinson* (2004) 33 Cal.4th 821, 836–837.) Unless the distinction "touch[es] upon fundamental interests" or is based on gender, it will survive an equal protection challenge "if the challenged classification bears a rational relationship to a legitimate state purpose." (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1200 (*Hofsheier*); see also *People v. Ward* (2008) 167 Cal.App.4th 252, 258 [rational basis review applicable to equal protection challenges based on sentencing disparities].)

We agree with defendant that the revised statute subjects two similarly situated classes of county jail inmates to disparate treatment: (1) those who, like defendant, committed their crimes before October 1, 2011, but were sentenced to county jail after October 1, 2011; and (2) those who committed their crimes after October 1, 2011, were sentenced to county jail and received the enhanced presentence conduct credits provided in newly amended section 4019. We also note defendant does not contend the classification here is subject to heightened scrutiny. Accordingly, the statute classification must be upheld " ' " 'if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. [Citations.] Where there are "plausible reasons" for [the classification], "our inquiry is at an end." ' " ' [Citations.]" (*Hofsheier, supra,* 37 Cal.4th 1185, 1200–1201, italics omitted.)

We recently addressed the same equal protection issue that defendant raises here in *Borg, supra,* 204 Cal.App.4th 1528. In *Borg*, we held that the prospective application of section 4019 does not violate equal protection principles. (*Borg, supra*, at p. 1539.) In so holding, we concluded that a rational basis exists for the timing and prospective application of the effective date of the 2011 amendments to section 4019, reasoning the

amendments were adopted for a predominantly fiscal purpose and that the Legislature was entitled to balance that purpose against the "public safety interests" served by the preexisting credit regime: "Reducing prison populations by granting a prospective-only increase in conduct credits strikes a proper, rational balance between the state's fiscal concerns and its public safety interests." (*Borg, supra,* at p. 1539.) We see no reason to question the soundness of our prior opinion. Accordingly, we find defendant's equal protection claim fails.

Kapperman, on which defendant relies, does not dictate a contrary conclusion. *Kapperman* involved an equal protection challenge to legislation that granted credit for actual time spent in presentence custody on a prospective basis only. (*Kapperman, supra,* 11 Cal.3d 542, 544–545.) The *Kapperman* court found no rational basis for this prospective-only application and retroactively extended the credit. (*Id.* at p. 545.) *Kapperman* is inapposite, however, because it involved actual custody credit, not conduct credit. The *Kapperman* court itself distinguished between actual custody credit—what was at issue in *Kapperman*—and " 'good-time' credit awarded as a bonus for good conduct and efficient performance of duty while in prison." (*Id.* at p. 548.) The distinction makes sense. Conduct credits must be earned, whereas presentence custody credits are awarded automatically, based on the time served prior to sentencing. The two types of credit differ in purpose as well. The purpose of conduct credits is to incentivize good conduct; custody credits offer no corresponding motivation.

II. Remand is Needed for Proper Determination of Mandatory Fines

At sentencing, the trial court imposed restitution fines as follows: "He's ordered to pay a restitution fine in the amount of $660 which includes a 10 percent administrative fee to be paid in a manner to be determined by probation. [¶] He's also assessed a restitution fine in the amount of $400 pursuant to Penal Code section [1202.4, subd. (b)] to be paid in a manner to be determined by the Board of Corrections should the stay on the sentence be lifted. [¶] . . . [¶] He's ordered to pay an additional restitution fine pursuant to Penal Code section 1202.45 in the same amount as that previously imposed. That's the $400 dollar figure. However, that restitution fine is suspended unless his

parole is revoked. [¶] . . . [¶] He's ordered to pay an additional restitution fine pursuant to Penal Code section 1202.44 in the same amount as that previously imposed. That's the $600 figure. However, that fine is suspended unless his probation is revoked." The sentencing minute order details that a $600 restitution fine was imposed pursuant to section 1202.4, subdivision (a)(3)(B),[4] plus a 10 percent "Administration fee," that the $400 restitution fine (suspended unless parole revoked) was imposed under section 1202.45, and that a $600 restitution fine (suspended unless probation is revoked) was imposed pursuant to section 1202.44.

Defendant contends this case must be remanded to allow the sentencing court to clarify the mandatory fines imposed. He correctly observes that the sentencing court's oral pronouncement appears to have imposed a $600 fine (plus 10 percent) and a $400 fine, both under section 1202.4, subdivision (b).[5] Also, the fines imposed under sections 1202.44 and 1202.45 are supposed to mirror the section 1202.4 fine, but do not. By their own terms, both section 1202.44 and 1202.45 must be in the same amount as that imposed under section 1202.4.[6] The People concede there is confusion on this point. Accordingly, we remand the matter for clarification on the mandatory fines to be imposed in this case.

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[4] Section 1202.4, subdivision (a)(3)(B), provides, in relevant part: "The court, in addition to any other penalty provided or imposed under the law, shall order the defendant to pay . . . [¶] . . . [¶] . . . [r]estitution to the victim or victims, if any, in accordance with subdivision (f), which shall be enforceable as if the order were a civil judgment." We note restitution as to Home Depot was reserved at the sentencing hearing.

[5] Subdivision (b) of section 1202.4 provides: "In every case where a person is convicted of a crime, the court shall impose a separate and additional restitution fine, unless it finds compelling and extraordinary reasons for not doing so, and states those reasons on the record." Section 1202.4, subdivision (*l*) provides for a 10 percent administrative fee to be imposed on any restitution fine ordered pursuant to section 1202.4, subdivision (b).)

[6] Section 1202.44 provides, in relevant part: "the court shall, at the time of imposing the restitution fine pursuant to subdivision (b) of Section 1202.4, assess an additional probation revocation restitution fine in the *same amount as that imposed pursuant to subdivision (b) of section 1202.4*." (Italics added.) Section 1202.45 provides, in relevant part: "the court shall at the time of imposing the restitution fine pursuant to subdivision (b) of Section 1202.4, assess an additional parole revocation restitution fine in the *same amount as that imposed pursuant to subdivision (b) of Section 1202.4*." (Italics added.)

DISPOSITION

The trial court's orders imposing the $660 restitution fine (referenced as made pursuant to § 1202.4, subd. (a)(3)(B)), the $400 restitution fine (§ 1202.4, subd. (b)), the parole revocation fine of $400 (§ 1202.45), and the $600 probation revocation fine (§ 1202.44) are vacated. The matter is remanded for clarification, in accordance with this opinion, as to the mandatory fines imposed. The court is directed to prepare an amended abstract of judgment accordingly and forward a certified copy to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

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Dondero, J.

We concur:

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Marchiano, P. J.

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Banke, J.